Supreme Court of the United States

OCTOBER TERM, 1966

No. 253

PHIL WHITUS AND LEON DAVIS, PETITIONERS

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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[fol. 1]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

April Term, 1965

Number 1229

[File Endorsement Omitted]

STATE OF GEORGIA

vs.

PHIL WHITUS

PETITIONER'S CHALLENGE TO THE ARRAY OF GRAND JURORS—filed April 8, 1965

Your petitioner, PHIL WHITUS, files this his challenge to the array of Grand Jurors selected and now serving on the Grand Jury for the April Term of the Superior Court of Mitchell County, Georgia, and shows as follows:

1.

That pursuant to the order and judgment of the United States Court of Appeals for the Fifth Circuit in Whitus versus Balkcom rendered in June 1964 and made final on January 7, 1965, the Honorable Fred Hand, Jr., Solicitor General of the Mitchell County Superior Court, will present the said Phil Whitus for indictment for an alleged homicide by the Grand Jury in and for Mitchell County, Georgia, to be convened on or after the second Monday in April 1965 for the April Term of said Court.

2.

That the said Grand Jury to which said case will be presented for indictment is illegally and unconstitutionally composed and drawn and is in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and is further in violation of Article One, Paragraphs

One and Twenty-Five of the Constitution of the State of Georgia of 1945, said violations itemized as follows:

(a) That up to and including the January Term of the Mitchell County Superior Court no member of the Negro race has ever served on said Grand Jury; although Mitchell County has a population according to the 1960 [fol. 2] census of 19,652 citizens and of this number approximately 9,000 are Negroes.

(b) If any Negroes are selected for jury service on the April Term of the Mitchell County Grand Jury your petitioner contends that the selection of such Negroes must, of necessity, be and will in fact be based solely upon their race and that such deliberate inclusion of Negroes on the said Grand Jury deprives your petitioner of Due Process of Law and Equal Protection of Law guaranteed him by the Fourteenth Amendment of the Constitution of the United States.

(c) Your petitioner contends and alleges that under the laws in force of the State of Georgia at the time of the filing of this petition the Jury Commissioners are required to select the names of prospective jurors from the Tax Receiver's Tax Digest and the Tax Receiver is required by law to maintain his Tax Digest on a racially segregated basis; and therefore, the mechanics for the selection of jurors required by the laws of the State of Georgia make discrimination probable, and as such mechanics for the probability of discrimination do exist by law, it follows that any jury selected under the mandatory requirements of such laws would be unconstitutionally composed.

3.

Your petitioner is a member of the Negro race and has been accused of murdering Peter Glen, Jr., a member of the White race and in such a case in order for the Grand Jury to fairly and impartially act, it is necessary and compulsory that the Grand Jurors be selected without discrimination as to race.

4.

Of the 9,000 Negro citizens in Mitchell County, Georgia, there are many well-educated and highly intelligent citi-

[fol. 3] zens who are, by law, eligible to serve on grand juries.

5.

Your petitioner further contends that the laws of the State of Georgia require that the names of the Grand Jurors who are to serve at the April Term must be drawn in open court immediately after the close of the January Term of the Mitchell County Superior Court, and your petitioner further shows that this was not done in accordance with the requirements of the law.

6.

Your petitioner further shows that both the statutory processes for the selection of the names of Grand Jurors and the manner in which the particular Grand Jurors in Mitchell County were selected has resulted in the systematic exclusion or inclusion of Negroes on grand juries in Mitchell County.

7.

Your petitioner further avers that proceedings before the said Grand Jury will deprive him of Due Process of Law and Equal Protection of Law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and of rights guaranteed him by Article III, Section 2, and the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

WHEREFORE, the said Phil Whitus prays that his challenge to the array be inquired into and that the said array be quashed, and that the said Phil Whitus have such and other relief as will meet the ends of equity and justice.

This 7th day of April, 1965.

/s/ P. Walter Jones
Of Counsel for Phil Whitus

[fol. 4] *Duly sworn to by P. Walter Jones jurat omitted in printing (all in italics)*

[Certificate of service Omitted in printing]

[fol. 5]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

Number 1229

STATE OF GEORGIA

vs.

PHIL WHITUS

ORDER TO SHOW CAUSE—April 10, 1965

The foregoing petition read and considered, the same is hereby ordered filed. The petition having shown that service of same has been accomplished by mailing a copy of same to the Honorable Fred Hand, Jr., Solicitor of the South Georgia Circuit, let a copy of this Order be served upon the said Mr. Hand and have him show cause before me on the 16 day of April, 1965, at 9 o'clock A.M., at the Court House in Camilla, Georgia, why the prayers contained in said petition should not be allowed.

This 10 day of April, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia.

[fol. 6]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

INDICTMENT—filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell

to-wit:

1 C. B. Collins Foreman.

2 D. B. Harrell

3 Thomas Lee Adams

4 John S. Gale

5 [redacted]

6 E. J. Hinchliffe

7 [redacted]

8 Drewry Robison Sr.

9 J. C. Ballard Jr.

10 Ray Nazworth

11 [redacted]

12 J. C. McCallister

13 H. C. King

14 John C. Kemper

15 Lee Arn. Collins

16 Drewry O. Hayes

17 Cleo A. Scruggs

18 Walter L. Rickson

19 Hayward Snipes

20 Theo Thompson

21 L. T. Hatcher

22 Louis M. Autry

23

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

[fol. 7]

WITNESSES FOR THE STATE

Douglas Townsend
Mrs. Peter Glenn
John M. Maples
Lynnwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

* * * *

No. 1229

SUPERIOR COURT
Mitchell County
April Term, 1965

THE STATE

vs.

LEON (LYNN) DAVIS
PHIL WHITUS

Murder

TRUE BILL

/s/ Brantley Collins
Foreman.

FRED HAND, JR., Solicitor General
JOHN M. MAPLES
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Baliff, and FILED IN OFFICE APR 12, 1965

/s/ Martha B. Hoggard
Clerk Superior Court

* * * *

[fol. 8]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

Number 1229

[File Endorsement Omitted]

THE STATE

vs.

PHIL WHITUS

Number ———

THE STATE

vs.

LEON (LYNN) DAVIS

TRANSCRIPT OF HEARING—April 16, 1965

Challenge to the Array (Grand and Petit)
Before His Honor
Carl E. Crow,

APPEARANCES:

FRED B. HAND, JR.,
Solicitor General
South Georgia Judicial Circuit,
Pelham, Georgia, and
Robert Culpepper, and
James Brim,
Camilla, Georgia,
For The State.

P. WALTER JONES,
Albany, Georgia, and
Morris Brown,
Atlanta, Georgia,
For Defendant Phil Whitus.

CLARENCE MAYFIELD,
910 West Broad Street,
Savannah, Georgia,
For Defendant Leon Davis.

[fol. 9]

Challenge to the Array of Grand Jurors and Petit Jurors

STIPULATION

The defendants, Phil Whitus and Leon Davis, are present in open court with their counsel, P. Walter Jones, Morris Brown and Charles Morgan for Phil Whitus, and Clarence Mayfield for Leon Davis; and

It is agreed between counsel for the defendants and the State that all testimony and evidence in the Challenge to the Array of Grand Jurors and to the Challenge to the Array of Petit Jurors shall be applicable to both cases.

It is further stipulated that each case, that is The State vs. Phil Whitus and the State vs. Leon Davis, will bear its own number and all records will be maintained separately and will not be joined in any manner, except as to the evidence on this hearing.

§ § § § § § § §

[fol. 11] Frank S. Twitty, Sr., Sworn

Direct Examination

By: P. Walter Jones

Q. State your name, please.

A. Frank S. Twitty, Sr.

Q. How long have you been practicing law in Camilla, Georgia, Mr. Twitty?

A. Since June 5th, 1928.

Q. Have you praced in the Superior Court in Mitchell County, Georgia?

A. I have.

Q. Have you attended almost all of the terms of Superior Court?

A. I would say practically.

Q. In your knowledge has any negro ever served on a petit jury in Mitchell County?

A. Yes, we had one as a member of the Grand Jury this term and two on the petit jury list, when I tried a case.

Q. Prior to the April term of court do you remember a negro ever serving on the jury in Mitchell County, Georgia?

A. I don't recall. There could have been, but I just don't recall.

Q. Do you ever remember seeing one?

A. I wouldn't say that I did or didn't.

Q. Have any ever served on your juries?

A. None have ever served on my juries in this court or in Federal Court. I strike them.

[fol. 12] Q. Have any ever been on the panel of jurors which was cast upon you in the trial of a case?

A. There was this time.

Q. I don't mean this time. Any prior to this?

A. I don't recall.

Q. Would you recall, do you think, if it had been done? Isn't it rather unusual?

A. Well, when you've been practicing law for about 37 years and tried about a thousand cases, you can't remember everything that happened.

Q. Do you ever remember striking a juror because he was a negro?

A. Striking one because he was a negro?

Q. In the Superior Court?

A. I usually strike a joror because I'm trying to get the best ones that I think will be better for my client, whether they're black or white.

Q. Have you ever seen a negro sitting in a jury box in Mitchell County?

A. I saw one this term.

Q. Let's eliminate the April term of court. With the exception of the April term of court, have you ever seen a negro sitting in the jury box in Mitchell County, Georgia?

A. I don't think so. I've been thinking about it since I got your subpoena and it seems to me that a negro by the name of Arch Diamond—a big Republican—and [fol. 13] Timothy Katchum—several years ago—I thought they served. I'm not sure, but I have the definite impression that they did serve at one time, but I wouldn't be sure. I'm not sure, but I just have the idea they did.

Q. They didn't serve on your juries?

A. No. In fact, I don't recall any having served on my juries, because my experience with my negro clients is they would rather have white men serve on the jury.

Q. Mr. Twitty, with the exception of the April term, have you been in attendance in court when your case was not being tried?

A. Have I been in attendance when—

Q. Have you been in the court when other cases were being tried?

A. Very seldom do I just hang around. When I'm in court and they select a jury, I'm usually about my business just like I've asked you to let me go now, because I'm trying to get back to my office. I hardly ever hang around when I'm not trying a case.

Q. But all the times you have been in court, with the two exceptions which you think might have happened, do you remember any other negro ever serving on the jury?

A. I can't recall.

Q. Have you ever heard it discussed whether one has served on the jury or not?

A. As I told you, after I got your subpoena the other day, we were talking about it and I say I don't know, but [fol. 14] I remember those two names came up and the people I heard said they were under the impression that they had served on the jury. You asked me if I had had any conversation and a group was talking and they said they thought that there had been several to serve. They said they knew there were quite a few in the jury box and they thought some had served. I don't know. I don't recall.

Q. Who were you talking to?

A. Just a group of us talking.

Q. Who was in that group?

A. I don't recall who all was in the group.

Direct Examination

By: Clarence Mayfield

Q. You are a practicing attorney in Mitchell County?

A. That's correct.

Q. And you have been practicing since 1928?

A. That's correct.

Q. Of your own knowledge has any negro ever served on the grand or petit jury in Mitchell County prior to 1959?

A. I don't recall any specific one.

Q. Since 1959 has there been any negro serving on the grand or petit jury?

A. There is this time. Dewey Robinson, Sr., is on the grand jury, and I know last week we tried a case and the other side struck one by the name of Lewis. They were both colored people.

[fol. 15] Q. What is the negro population of Mitchell County?

A. I don't know, but I would say my guess would be around 40 or 45 per cent of the population.

Q. Of your own knowledge are there any negro property owners in Mitchell County?

A. Yes, there are property owners.

Q. Of your own knowledge do these particular negroes pay taxes on this particular property?

A. I imagine they do. We require everybody to pay taxes on property.

Q. Then would it be a fair assumption to say that there were negroes qualified to serve on grand juries and petit juries prior to 1959?

A. Let me say that I don't think that the fact that a man owns property qualifies him to be a grand juror or a petit juror—just simply the fact that they own property. I think there are other qualifications, which, as you know, are set out in the Code.

Q. Does Mitchell County maintain a common school for negroes?

A. We have the common school system in Mitchell County and we have the negroes and the whites going to school.

Q. Have you any personal knowledge of any negro graduates from the respective schools here in Mitchell County?

A. We have quite a few negroes who have graduated from the Rockdale Consolidated High School.

Q. And if they met the other qualifications would you consider them, in your own opinion, to be qualified to [fol. 16] serve as petit or grand jurors?

A. I'll answer this way. I think that if I were called upon to pass judgment, I'd want to know something about each individual and not just make a blanket statement about somebody being qualified. I think each individual would have to be considered himself. He might own property but he might have served a prison term, or a man could own property and be living in adultery. I think each individual has to be considered alone.

Q. It's your testimony then that each individual juror, grand or petit, is personally selected according to personal qualifications?

A. I haven't served on the Board of Registrars and I don't know what criteria they have used. I was just speaking of myself. You asked me the question about my opinion.

Q. Of your own knowledge, sir, are there separate tax digests maintained for negro and white taxpayers?

A. I honestly don't know. I haven't examined it this year.

Q. Prior to this year, sir, were there separate tax digests maintained for negro and white?

A. There is a possibility that could be. I wouldn't want to say positively until I went down and actually examined them myself to determine. I just don't recall right now whether they were separate or not.

Q. Can you determine for the record the type of designation that was used to differentiate between the negro taxpayer and the white taxpayer?

[fol. 17] A. I have no knowledge of that.

Q. Do you recall whether or not there was a difference in the paper in the ledger maintained for the negro and the white taxpayer?

A. I can't recall at this time. If I could examine them I could tell you, but right now, not knowing that I'd be asked the question, I have no specific knowledge about that.

Q. And it is your testimony that this is the first time in your recollection of your own knowledge that a negro served in this term of court since you have been practicing since 1928, I believe?

A. I have been practicing since 1928. I don't recall any having served.

Q. And this is the first time in your memory, this year?

A. First I can recall right now.

Redirect Examination

by: P. Walter Jones

Q. You say negroes were called for jury duty in the April term of Superior Court?

A. There were negroes on the petit jury last week and there were some on the grand jury.

Q. How many were on the grand jury?

A. I don't recall. I happen to know one of them who is serving on the grand jury. I wasn't up here when they were drawn, but I happen to know Dewey Robinson, Sr., who is doing some work for me, is serving on the grand jury.

[fol. 18] Q. Did you have any cases in superior court?

A. Yes, Mr. Culpepper and I tried a case and there was a negro on the petit jury this past week, or in fact this week.

Q. Do you know how many were summoned for jury duty?

A. No, I really don't.

Cross Examination

By: Solicitor Hand

Q. Did you ever make it your policy to determine whether or not there were in fact negroes on either the petit jury or grand jury?

A. I paid no particular attention to that. I might say that the list didn't say who were negroes and who were white people even this time.

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[fol. 19] E. T. Hughes, Sworn.

Direct Examination

By: P. Walter Jones.

Q. State your name to the court reporter, Judge Hughes.

A. Edward T. Hughes.

Q. Judge, how long have you been practicing law in Camilla?

A. I believe since 1938, 1938 or 1939.

Q. With the exception of the April term 1965, have you ever heard of a negro serving on the grand jury?

A. I can't say that I have.

Q. Have you ever heard of a negro serving on the petit jury?

A. I can't say that I have.

Q. Have you ever heard of a negro summoned for jury duty in the panel of jurors?

A. Seems to me like there was one. I don't remember the time or any particular incident, but seems to be something in my memory about one being summoned. I don't know any details—I don't recall.

Q. Just according to your memory, one might have been summoned for the petit jury?

A. Some court.

Q. Do you know whether any have served on a petit jury in your memory prior to the April 1965 term?

A. I haven't seen any. They could have, but I haven't seen them.

Q. You have been in attendance in court fairly regularly?

A. Well, fairly regularly.

[fol. 20] Q. The three deans of Camilla lawyers are you and Mr. Twitty and Mr. Culpepper. Is that correct?

A. I guess you are referring to us as the senior members—

Q. I'm putting myself in the same category.

A. and I think that would be true.

Direct Examination

By: Clarence Mayfield

Q. Just a couple of questions, Judge. When did you begin the practice of law in Camilla?

A. Either in '38 or '39, somewhere along in there.

Q. And I think it's your testimony on direct by Mr. Jones that you recall one negro serving?

A. I think my testimony was it seems to me like one was called. I am not positive of any details or anything—it just seems like there was one.

Q. Then you cannot positively testify there has ever been a negro, of your own knowledge, who served on the grand or petit jury?

A. I haven't seen one. He could have served without me having seen them on the grand jury or the petit. Personally I don't recall ever having seen one.

Cross Examination

By: Solicitor Hand

Q. Judge, you don't know of your own personal knowledge whether or not 1 or 100 negroes have been summoned to serve on either the petit or the grand jury, do you?

A. No, that could have been without my knowing it.

[fol. 21] Q. Is it customary in this county for jurors, both petit and grand jurors, to ask to be excused from jury service?

A. Correct.

Q. Do you know from your own personal knowledge whether people have been excused?

A. I quite well know that. A number of them have been excused.

Q. From your own personal knowledge you don't know whether any negroes have been summoned prior to this court or not, do you?

A. Not from my personal knowledge. They could have been summoned and then excused.

Q. You don't have any personal knowledge of whether they were or were not summoned, do you?

A. My personal knowledge—I don't recall.

Redirect Examination

By: Clarence Mayfield

Q. In your opinion are there any intelligent qualified negroes to serve on either the petit or the grand jury here in Mitchell County?

A. That calls for an opinion and I would have no basis for expressing an opinion, because I haven't talked with anyone with reference to determine and I don't know what qualifications the jury commissioners use to determine that, and I just wouldn't want to express an opinion, because I have no basis for expressing an opinion.

§ § § § § § § §

[fol. 22] P. Walter Jones: I would like to call Mr. Robert Culpepper.

Robert Culpepper: I would like to state that myself and my associate, Mr. James C. Brim, Jr., are associated with the prosecution.

P. Walter Jones: I understand. Raise your hand, Mr. Culpepper.

Robert Culpepper, Sworn.

Direct Examination

By: P. Walter Jones

Q. State your name.

A. Robert Culpepper, Jr.

Q. Mr. Culpepper, how long have you been practicing law in Camilla, Georgia.

A. I was admitted to practice law in December 1930. I served several years as a court reporter in the Albany Circuit, Cordele Circuit, and with Judge Deavor. I went to Washington for three years as secretary to Congressman Cox, and I came back here January 1, 1937, and I've been consistently practicing law since that date, in Camilla.

Q. Since you have practiced law in Camilla have you ever heard or seen a negro serve on the grand jury in Mitchell County, Georgia?

A. As these others have testified—I've been in and out of court all my life—I don't have any recollection of any

having served. I didn't know who the negroes were [fol. 23] that served this last time. They called a case in court and a negro appeared on the petit jury, named Scott Lewis, and that I didn't know was a negro or not a negro, and actually the side that I represented—we didn't strike him, but he was stricken.

Q. To your knowledge none has ever served on the grand jury? I'm speaking prior to the April term.

A. I have no knowledge one way or the other that any has ever served.

Q. To your knowledge have any served?

A. Not to my personal definite knowledge.

Q. When you have come to court and seen the grand jury in session, you haven't seen a negro on the grand jury prior to the April term of court?

A. I actually don't recall any.

Q. Have you ever heard of a negro serving on the petit jury in the Superior Court of Mitchell County, Georgia, prior to the April term 1965?

A. Actually, I've never seen one on the petit jury here, and I've tried numerous cases in Federal court and I've never seen a negro on a petit jury in Federal court, Thomasville, Albany, Valdosta, and other places.

Q. And you haven't ever seen one in Mitchell County?

A. I don't have any recollection of having seen one.

Q. You and Mr. Twitty and Mr. Hughes are the oldest practitioners in Camilla, aren't you?

A. I don't know how old they are, but I assume we fall [fol. 24] in that category. We're all getting along.

Q. I come in that group too.

Direct Examination

by: Clarence Mayfield

Q. Mr. Culpepper, in the practice of law here in Camilla do you have occasion to do title examination?

A. Frequently.

Q. Do you have occasion also to search the tax digest?

A. Frequently.

Q. Of your own knowledge, does Mitchell County maintain separate tax digests for the white and negro residents of Mitchell County?

A. I don't think they keep separate books on them. It's all in the same digest, same cover.

Q. Is there any indication or designation on the books to indicate whether or not the taxpayer is colored or white?

A. There possibly is, but it's all under the same cover. I couldn't say, but those books are open down there and you can check.

Q. But you do not know whether or not—

A. I've never been impressed by the fact—it has no significance to me—I'm pretty well familiar with most of the negroes who own property—I know most of them.

Q. And since 1937, at which time you say you commenced the practice of law in Camilla, Georgia, you have [fol. 25] never seen a negro serve on the grand or petit jury?

A. I have no personal knowledge or recollection of that. Whether one has served or not, I don't know.

Q. I would like to ask you, sir, in your opinion, as a practicing attorney and based on your statement that you have a personal knowledge of most of the negroes in Mitchell County, would you say there are any who are qualified to serve on grand or petit jury?

A. That goes back to the question of what negro you are talking about, or what white person you are talking about, for that matter, as to whether they should serve on the jury. I know quite a few people of any race that I don't think I'd care to have on the jury. It would address itself to the qualifications of the individual.

Q. If among your local citizens you had what you consider to be an intelligent property owning negro, would you consider him to be qualified to serve on the grand or petit jury?

A. There again it goes back to the individual, just like the registrars—the jury revisers—they address themselves to the individual who comes up and not as a mass proposition, and the registrars do to. Each person stands on his own basis. There might be a lot of things—a man might have a master's degree from Georgia State up here at Albany that might not be able to pass the seventh grade. Actually, I served on the County Board of Edu-

cation a few years and I discovered that we had a negro [fol. 26] teacher who couldn't read and write.

Q. With that exception noted, did you find any who could read or write?

A. Oh, yes, plenty of them could read or write, but, like I said, I wouldn't say carte blanc—I wouldn't take any class, colored or white, and say all of them are qualified or all of them are disqualified to be on the jury. The registrars consider each problem. The law places an obligation on the clerk and the ordinary to advise them about a person's back record for sanity and crime, and they have a right to look into every phase of the matter. Just to say a whole class of folks are qualified is getting into the realm of conjecture.

Q. But you have never seen anyone serve, of the negro race, on either the petit or grand jury. Correct?

A. My most recent experience is that we had one named Scott Lewis from Sale City who was on the petit jury and sat right back there where George Smith is sitting now, and he was not stricken by my side.

Q. Would you, for the record, indicate which term of court this negro served on the jury?

A. It was this term of court.

Q. April term of court, 1965?

A. Right.

[fol. 27] Cross Examination

By: Solicitor Hand

Q. If somebody told you that negroes had served on the petit or grand juries, could you either affirm it or deny it?

A. I would not.

Q. In other words, you don't make it your policy to study whether or not negroes have served on the petit or grand jury?

A. I start studying the jury when I have a given case and the color has nothing to do with it—it may be who they're kin to, where they work, how long they've been in the county, and what they like and dislike. Sometimes you take people who like to drink and sometimes you take people who don't like to drink—their religion has

something to do with it—every phase of a man's life might bear on the particular type case you have. Color has nothing to do with it.

Q. To your personal knowledge, you don't know whether one or a hundred negroes have been summoned for jury service for either the petit or the grand jury, do you?

A. That's correct, but I'd say not a hundred because we don't usually have a hundred on any panel.

Q. You don't know any number, whether it's twenty or—

A. Correct.

Q. Is it also customary in the courts of this county for jurors to ask to be excused, both grand and petit jurors?

[fol. 28] A. Yes. We have the situation with reference to ladies serving. You rarely ever see a lady here serving because they all ask to be excused. I don't know what the negro situation is about negroes being excused. I believe that probably some negroes on this last panel asked to be excused.

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OFFER IN EVIDENCE AND OBJECTION THERETO

P. Walter Jones: At this time we'd like to introduce into evidence the 1960 Census of Population, Volume I, Characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein it shows a total population in the County of persons over 21 as being 10,206, of which 5,726 are white and 4,480 are colored.

Solicitor Hand: I would object to the introduction of this document for the reason it has not been properly identified, and I move that all testimony which has just been read into the record be stricken on that ground.

P. Walter Jones: It is an official record and recognized by law as such.

Solicitor Hand: I insist upon my objection because it has not been properly identified.

[fol. 29] And I insist that Mr. Jones' testimony relating to that be stricken from the record. . . .

The Court: I sustain the objection.

P. Walter Jones: I would like to make an exception to that ruling.

The Court: All right, call your next witness.

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Harvey C. King, Sworn.

Direct Examination

By: P. Walter Jones

Q. Give your name to the court reporter, please.

A. Harvey C. King.

Q. Mr. King, are you one of the duly appointed jury commissioners of the County of Mitchell?

A. I am?

Q. When were you appointed?

A. I don't know—back in the fall. Last year was the first time I served.

Q. That would be in 1964?

A. Yes.

Q. Since your appointment has the jury commission revised its list?

A. Yes.

Q. When did you revise that jury list?

A. I can't recall just when, but sometime back.

[fol. 30] Q. Will you speak a little louder so I can hear you?

A. I can't remember just when, but sometime—I don't remember whether it was in the fall or this spring.

Q. You don't remember whether it was in '65 or '64?

A. No.

Q. Who all was present when the revision took place?

A. Well, the six that was appointed.

Q. Where were you? What space did you use when you revised the jury list?

A. We went down in the Ordinary's room.

Q. What records did you have with you where you could get the names of prospective jurors?

A. Well, we had the tax digest.

Q. Do you recall how the jurors were selected?

A. Well, I wouldn't say that I do. We chose some names.

Q. How did you select those names? Did you go thru the tax digest and call out names?

A. I believe that was it.

Q. That tax digest had the white taxpayers and the colored taxpayers separate?

Solicitor Hand: I have refrained from making objections up to this point, your Honor, but this is a witness for the defendant, he is on direct examination, and counsel has been consistently leading not only this witness but other witnesses, and I would appreciate it if The [fol. 31] Court would suggest to counsel that he ask the questions as provided by law under the rules of evidence.

The Court: Don't ask leading questions, Mr. Jones.

Q. Do the records or do they not have the white and colored taxpayers separate?

A. I can't say.

Q. Do you remember anything about when you selected the white taxpayers and from what records?

A. They were selected right along together.

Q. Who would call out the names? Would you call out the names or one of the other commissioners?

A. I couldn't say. Someone called them out.

Q. What would happen if you called out the name of one of the men on the tax digest? How would you ascertain or find out whether he was to be on the jury list or not?

A. I don't remember just how it was done.

Q. Did you attempt then to discuss the qualifications of each juror?

A. Well, I guess we did. That's usually the thing to do.

Q. Well, if you think you did, how did you discuss those qualifications?

A. I can't recall that.

Q. Did you just pick those names at random, if you didn't discuss it?

A. I wouldn't think we did. I would think there was something said concerning it, but I don't remember just what the discussion was.

[fol. 32] Q. Do you remember anything that was said concerning any juror?

A. That I can't tell you.

Q. Do you remember how many negroes were put on the jury list?

A. No, I can't say.

Q. Do you remember the names of any negroes being discussed?

A. Well, I don't recall.

Q. Do you remember whether any discussion was had as to any of the white jurors selected?

A. Well, I would think it would have been about the same thing.

Q. You don't recall any of the conversations in that room that night at all?

A. I couldn't tell you.

Q. Do you know of your own knowledge of any negro on the jury list who is upright and intelligent?

A. Yes.

Q. Would you name that negro?

A. I think this negro Robinson that served on the jury was intelligent.

Q. Do you know the name of any other upright and intelligent negroes in Mitchell County?

A. Well, there are a few I think—but as far as knowing, I don't.

Q. Why don't you know?

A. Because I haven't had any dealings with them.

[fol. 33] Q. So you haven't had any dealings with them and you don't know whether they are upright and intelligent or not, and as far as you are concerned when the jury list was selected, you don't remember any discussion about any juror?

A. I don't remember too much about it.

Direct Examination

By: Clarence Mayfield

Q. Would you again for the record describe the mechanics that the jury commissioners of Mitchell County used in selecting the jurors, grand and petit, of Mitchell County?

A. Ask that again.

Q. Will you describe in detail the mechanics used by the jury commissioners of Mitchell County in selecting grand and petty jurors?

A. I don't think I could do that.

Q. Once the list has been compiled, what then do you do with it?

A. It's turned in, I guess to the Ordinary.

Q. What, sir?

A. I think it went back to the Ordinary. I don't know.

Q. Well, the list that was certified to the Ordinary, as you have stated, of your own knowledge has there ever been a name of a negro on that particular list?

A. How's that?

[fol. 34] Q. On the list that you have certified to the Ordinary, of your own knowledge, was there ever a negro's name on that particular list?

A. There was negroes names on it.

Q. There were. Now, could you estimate, sir, approximately how many jurors were selected?

A. No, I can't recall that.

Q. You testified you have been a commissioner since 1964?

A. I believe that's right.

Q. For each term of court could you estimate the number of jurors selected from the tax list? For each panel?

A. No.

Q. Would you happen to guess 1, 2 or 3?

A. I wouldn't say.

Cross Examination

By: Solicitor Hand

Q. Mr. King, actually you are just testifying that you don't know the actual proceedure you take on selecting these jurors. Is that correct?

A. That's right. This is my first time.

Q. This is your first time of serving as a jury commissioner?

A. Yes sir.

Q. Did you individually practice any discrimination in the selection of prospective grand jurors or petit jurors?

A. No sir.

[fol. 35] Q. Did you try to select them in a manner so they would be able to meet the constitutional requirements of both the State and Federal Constitutions?

A. I thought that was the thing to do.

Q. Mr. Jones, in one of his questions, referred to your meeting at night. Did y'all meet at night?

A. No sir.

Q. Or in a secreted place?

A. No, in the daytime. We certainly did not.

Redirect Examination

By: P. Walter Jones

Q. Mr. King, you don't remember when you met, do you?

A. You mean the day?

Q. You don't know whether it was 1964 or 1965?

A. I think it was '64.

Q. When I first asked you you said you didn't know what year.

A. Maybe it was.

Q. Mr. Hand asked you the question that you met the constitutional requirements of the United States and of the State of Georgia in selecting the list?

A. Something like that.

Q. And you said you did?

A. To the best of my knowledge.

Q. What are those constitutional requirements?

A. I can't recall all of that.

[fol. 36] Q. Do you know any of the constitutional requirements?

A. Not at the present time.

Q. You say you met in the daytime?

A. Yes.

Q. In the Ordinary's office, and that was either '64 or '65?

A. '64, I believe it was.

Q. Do you remember whether you used the old jury list or not in compiling the new jury list?

A. I would think we did, but I couldn't say.

Q. You couldn't say. Do you know you did?

A. No.

Q. Who was chairman? Who conducted—
A. I don't remember.
Q. You don't remember who the chairman was. Who was present at the meeting?
A. Who was present?
Q. Yes sir, name those who were present when y'all revised the list.

Shirah?

A. Mr. Grogan, Autrey, Childs, Hammond, and—
Q. Did anybody conduct the meeting or did y'all just get in there and have a general bull session?
Solicitor Hand: Your Honor, I have made this objection once before. This is counsel's witness. He is an able lawyer and knows how to ask questions on direct examination.
[fol. 37] Q. Well, Mr. King, tell me just who ran the meeting. Was it run or wasn't it run by one individual?
A. Well, it wasn't run by one individual, I wouldn't think. Each one had something to say along occasionally.
Q. But you still don't remember how you selected the jury, what you used to select the jury?
A. I couldn't say.

Re:Cross Examination

By: Solicitor Hand

Q. Mr. King, let me ask you one further question. Did you personally purposely include or exclude anyone from either the petit jury or grand jury service because of their race, color or religion?
A. I certainly didn't.

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W. H. Grogan, Sworn

Direct Examination

By: P. Walter Jones

Q. You are one of the jury commissioners of Mitchell County, Georgia?
A. Yes sir.

Q. How long have you so served?
A. '64.
Q. Since 1964?
A. Yes.
[fol. 38] Q. Have you recently revised the jury list?
A. Yes, we have.
Q. When did you revise that jury list, Mr. Grogan?
A. In '65.
Q. What month? Do you remember that?
A. February, I think.
Q. February of '65. Did you use the old jury list in revising the jury?
A. We had the old jury list with us, but we didn't specially use it.
Q. Did you have the record from the tax receiver?
A. Yes.
Q. Are you familiar with those records?
A. No, not particularly.
Q. Do you know or not whether those records have the colored taxpayers and white taxpayers separated?
A. Well, they're altogether.
Q. In the digest?
A. Maybe separate digests, but all in one.
Q. When you selected the jurors, tell us the manner in which you would select each juror.
A. We had sections—I mean I was appointed from one section of the county and just the ones in that section are the ones I helped select from. As far as county-wide, I didn't.
Q. How would you get the names of the people in your section?
[fol. 39] A. From the digest, tax digest.
Q. What section do you live in, Mr. Grogan?
A. I live in the eastern section, Pebble City and Sale City.
Q. You live in the Pelham and Sale City section?
A. Pebble City.
Q. Pebble City and Sale City. How many negroes were on the tax digest from that section?
A. I didn't notice how many. There's not as many in that section as there are in other sections of the county.

Q. Were any negroes in that section selected for jury duty?

A. Yes.

Q. Who in that section were selected for jury duty?

A. Well, I don't remember just how many.

Q. Who in that section were selected?

A. Well, I don't know that.

Q. Did they ask you if you knew those negroes personally?

A. Nobody asked me, no.

Q. Did you know the negroes that were selected personally?

A. From my community I did.

Q. Do you remember any of the negroes that were selected from your section?

A. No.

Q. You don't remember any?

A. No, but there were some selected from out there.

Q. What did you do with the old jury list that you had available?

[fol. 40] A. We didn't do anything with it.

Q. Did you use it as reference or did you simply discard it and work completely from the digest?

A. Well, we checked thru it and took off the deceased and the ones that had moved off, but we done that first, so we wouldn't include them in the new list.

Q. When you had purged the old jury list, what did you do with it?

A. We didn't use that. After we took the deceased ones off and those that had moved off—then we went to the tax digest and got the list from the ones in it.

Q. When the names on the tax digest were called out would you know whether they were colored or white?

A. No, we wouldn't.

Q. How would you have known then that coloreds were selected from your area?

A. By personal acquaintance.

Q. You were personally acquainted with those that were selected. Now, do you remember what month in 1964 you were selected as jury commissioner?

A. It was in the fall, October or November.

Q. And the first revision was in February of this year?

A. Yes.

Q. Approximately how many people would you say are residents of your area?

A. I wouldn't know just how many.

[fol. 41] Q. Do you know whether there are more negroes than whites, or less negroes than whites?

A. Less negroes.

Q. Do you know the percentage?

A. No, I don't know that.

Q. Would you say it was 40-60?

A. No, 20-80 probably.

Direct Examination

By: Clarence Mayfield.

Q. How many jury commissioners do you have in Mitchell County, Mr. Grogan?

A. Six, I think.

Q. Do you have any negroes on the jury commission?

A. No.

Q. Of your own knowledge has there ever been any negroe on the jury commission?

A. I don't know.

Q. Do you know how many negroes were selected for the April term of Superior Court of Mitchell County?

A. No, I don't know.

Q. Do you know of your own knowledge whether any were selected?

A. I have been told they were.

Q. Do you know this of your own knowledge, sir?

A. I recognized the name of one in the paper that served on the grand jury.

Q. Would you, sir, hazard a guess as to the total num-

[fol. 42] ber of jurors selected for the April term of court?

A. No, I wouldn't.

Q. You have no idea?

A. No.

Q. When you made your last selections or revised the jury list, did the jury commissioners carry the names of the old list over to the new revised list?

A. Possibly some of them were on it.

Q. Now, of your own knowledge, were there any negroes on the old list prior to the revision?

A. Well, yes, I think there was some.

Q. You thing so?

A. I think so, yes.

Q. How is the tax digest kept? Do you have separate digests for white and colored residents?

A. Well, I don't know how they keep it. Each community has a different digest.

Q. Is it your testimony, sir, that each individual commissioner has the sole discretion in selecting the jurors whom he is going to certify?

A. Yes.

Cross Examination

By: Solicitor Hand

Q. In response to that, your individual jury commissioners just recommend to the commission as a whole whether or not an individual be accepted as a prospective grand juror or petit juror, and the entire commission [fol. 43] passes on each individual prospective grand juror or petit juror. Is that correct?

A. Yes, that's right.

Q. Did you personally purposely include or exclude anyone from prospective grand jury service or petit jury service because of their race, color, creed or national origin?

A. No, I did not.

Redirect Examination

By: Clarence Mayfield

Q. I think it was your testimony on cross examination that the jury commission as a whole passed on the qualifications of the jurors?

A. Well, we all checked it.

Q. Tell me what qualifications you used. What standards did you use to determine the qualifications?

A. Well, the most intelligent, upright citizens of the community over 21 years of age.

Q. Those are the standards that you used?
A. Yes.

Recross examination

By: Solicitor Hand

Q. Those are not the sole standards you used, are they?
A. No.
Q. Do you try to determine whether or not a man has been convicted of a felony or other serious crime or whether he's sane or incompetent?
A. Yes, that's right.
[fol. 44] Q. These factors you have enumerated on the stand are not the sole considerations, are they?
A. No, his character and all are included.

Redirect Examination

By: P. W. Jones

Q. How would you determine his intelligence? What tests did you use?
A. We didn't use tests. But just by knowing him, you have your opinion.
Q. Did you attempt to go into his educational background?
A. No.
Q. Did you attempt to question any of his friends or his neighbors about his intelligence?
A. No.
Q. How did you determine his uprightness?
A. Personally, if I knew him.
Q. Did you personally know the jurors that were selected, all of them?
A. All from our community.
Q. In your community, if you knew all of them, how many were negroes? You would have known whether they were colored or white, wouldn't you?
A. We didn't keep count of them.
Q. But you would know when a name was called out in your community whether that juror was colored or white?
A. If you personally knew him you would, yes.

[fol. 45] Q. Have you got any approximate idea how many colored jurors were selected from your area?

A. Well, I don't.

Q. How many jurors were selected in all?

A. I don't know that number, but between 5 and 600, I guess.

Q. Out of that number how many were negroes?

A. I don't recall. We didn't check it separate.

Q. You have no idea how many negroes are on the jury list at the present time?

A. No, I don't.

Redirect Examination

By: Clarence Mayfield.

Q. I believe it is your testimony that the jury commissioners evaluate individual—

Solicitor Hand: Your Honor, I submit counsel is leading.

Q. What standards again did you say you used to determine the qualifications of a juror?

A. Well, his intelligence, uprightness, character, and the best qualified citizens in the community, highest standards.

Q. Now, would you share the same degree of knowledge of a colored juror as a white juror?

A. Some of them I would.

Q. And on what basis do you predicate this?

A. The same as I told you.

Q. Do you welcome any negro in your home, sir?

[fol. 46] Solicitor Hand: Your Honor, I submit that is irrelevant and an improper question.

Clarence Mayfield: If Your Honor please, I am trying to determine whether or not Mr. Grogan, together with the other commissioners, shares an acquaintance with the negroes such as to determine a man's moral uprightness. . . . I am trying to determine how the commissioner determines whether he exemplifies high moral standards . . .

The Court: I don't think that has anything to do with this case—whether he has been in his home . . . .

Clarence Mayfield: I withdraw the question.

ReCross Examination

By: Solicitor Hand

Q. For the record, let's recap the general method by which you jury commissioners select the various jurors. I believe you testified earlier that each jury commissioner screens people who come from his area of the county—each jury commissioner would know the people who come from his area of the county—and would make a recommendation to the commission as a whole that a man either be accepted or not accepted as a prospective juror. Is that correct?

A. That's right.

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[fol. 47] O. C. Hammond, Sworn.

Direct Examination

By: P. W. Jones

Q. State your name to the court reporter, please.

A. O. C. Hammond.

Q. Mr. Hammond, are you a jury commissioner for Mitchell County, Georgia?

A. Yes sir.

Q. When were you selected or appointed to that position?

A. I believe in '64.

Q. Did you as a jury commissioner participate in the revision of the jury list?

A. I did.

Q. What month was that?

A. It was, I believe, February '65.

Q. February of '65?

A. Yes.

Q. Did you have the tax digest?

A. Yes, we did.

Q. Does that tax digest show which of the taxpayers are colored and which are white?

A. Not necessarily.

Q. What do you mean by not necessarily?

A. Well, that's what I mean.

Q. Could you determine from the digest which were colored taxpayers and which were white?

A. No.

[fol. 48] Q. How were the jurors selected by the jury commission?

A. Well, we went thru and the ones that had moved out of the county and we knew positively they had, and the deceased,—we took them out, and we put in what we thought was the required number to get the digest back up to where—I mean the—

Q. Did you get that information of the deceased and those that had moved out of the county from the tax digest or the old tax list?

A. I don't remember.

Q. How many jurors did you ultimately select for the petit jury?

A. I don't remember.

Q. How many did you select for the grand jury?

A. I have no idea.

Q. How many negroes were on the petit jury?

A. I have no idea.

Q. How many on the grand jury?

A. I have no idea.

Q. Do you remember discussing the qualifications of any of the negro jurors?

A. Well, I'll say this. I'm City Clerk at Pelham, Georgia, and I've worked on about 18 digests since I've been down there and I also have charge of utilities, and I am pretty well familiar with the negroes in my section.

Q. And you would determine then which of the negroes from your section would be on the jury?

[fol. 49] A. Yes sir.

Q. How did you determine which—

A. I just know the ones that are honest and upright—I know they've lived in the county for 6 months, and I'm pretty well familiar with criminal records, and I think I knew.

Q. How many negro college graduates are in your section?

A. I wouldn't know.

Q. Do you know how many negroes have graduated from high school in your section?

A. No, I wouldn't, but there are a good many, I would say.

Q. Do you know how many negroes have moved into your section from other sections who are college graduates?

A. No sir, I do not.

Q. What rule did you use in determining the most intelligent?

A. Well, I think from my association and my job down there that I pretty well know the most intelligent in Pelham. Now, I don't know the ones in Camilla, but in Pelham I do.

Q. Did each jury commissioner finally pass on each one?

A. Yes, we did. We discussed it.

Q. But what happened is they would take your word—

Solicitor Hand: Your Honor, I submit again that counsel is leading.

P. W. Jones: I don't think so, Your Honor. I'm trying to get a simple answer to—

The Court: You were leading. You can re-phrase the question without leading.

[fol. 50] Q. Mr. Hammond, did you or did you not all pass on the qualifications?

A. Isn't that the same question you asked me a few minutes ago?

Q. Yes, but they said I was leading you, and I changed it a little bit.

A. We discussed each individual one we put on, if I remember right and I think that's right.

Q. Did the other commissioners or did they not accept the ones from your area on your sayso?

A. Well, more or less, but I think I do remember one that another commissioner objected to.

Q. Did you or did you not accept the jurors who were in the other commissioners districts on their say?

A. I have confidence in the other five commissioners. I think they are as fine fellows as there are in Mitchell County, and I'd go along with almost anything they say.

Q. Did you or did you not accept their recommendation as to the jurors?

A. Yes, I think so.

Q. Did you or did you not exclude any men which they had selected?

A. No, I didn't.

Q. You accepted everyone?

A. That's right.

[fol. 51] Cross Examination

By: Solicitor Hand

Q. Did you personally purposely include or exclude any person for prospectively grand jury duty or petit jury service because of race, color, creed or national origin?

A. I did not.

Q. Do you personally know how many negroes are in either the petit jury box or the grand jury box?

A. I do not.

Fred B. Hand, Jr., Sworn

Cross Examination

By: P. W. Jones

Q. You are Solicitor of the Mitchell County Circuit, are you not?

A. I'm Solicitor General of the South Georgia Judicial Circuit.

Q. As that Mitchell County is in your jurisdiction?

A. That is correct.

Q. When did you take over the office?

A. In May 1964.

Q. How many terms of the Mitchell County Superior Court have you been in attendance since your selection to that office?

[fol. 52] A. Two, I believe.

Q. One was last July?

A. I believe that is correct.

Q. And the other one was this April?

A. That is correct.

Q. Mr. Hand, were there any negro jurors on your grand jury in the term of court you held last July?

A. I don't remember any.

Q. You dealt with them, did you not?
A. I did.
Q. You were in the room with them?
A. I was.
Q. You worked with them, did you not?
A. I did.
Q. You would certainly remember, wouldn't you?
A. In all probability, I would.
Q. Were there any negro jurors in the petit jury?
A. In the panel?
Q. In the panel?
A. I don't know.
Q. During criminal week did you make an investigation into the jurors to properly strike the list for the State?
A. I did not.
Q. Did you have an assistance in striking the list?
A. At the July term 1964?
Q. Yes.
[fol. 53] A. I don't remember.
Q. Mr. Hand, Mitchell County has a term of court scheduled for January, do they not?
A. I believe that's correct.
Q. Why didn't you hold a term last January?
A. There had been no criminal cases brought to my attention, nor was a grand jury selected, to my knowledge, or called in service to my knowledge.
Q. There were no crimes committed in Mitchell County—
A. I did not say that. I said none were called to my attention.
Q. Do you ever remember another term of Mitchell County Superior Court that was not called at all into session?
A. What is that?
Q. Do you ever recall another term of Mitchell County Superior Court that was cancelled?
A. I don't have any independent recollection of whether courts were called into session or not. I haven't practiced in the county that long.
Q. But the January term was cancelled, was it not?

A. I would not say that it was cancelled.
Q. What happened to it?
A. I don't know, not of my personal knowledge.
Q. They didn't hold the January term, did they?
A. I had no criminal prosecution at the January term of court.
[fol. 54] Q. Did the grand jury meet in January?
A. No, it did not, not to my knowledge. I'll say this in response to your question—we take pleas of guilty by accusation—I draw accusations all during the year when people want to plead guilty, and we will dispose of numerous cases thruout the year in that fashion. If the jail isnt' crowded, we have two terms a year, since I've been solicitor, and we take guilty pleas in the interim, and dispose of quite a few cases. We did that at this term, and it's my policy, as long as the judge agrees, to continue to do that.
Q. But you did not hold the January term of court?
A. I did not.

Direct Examination

By: Robert Culpepper

Q. Isn't it true that for many years we have only two terms of court and that is April and October?
A. From the best information I get that is correct.
Q. For the last four or five years we have had four terms, January, April, July and October, but isn't it true that we have never had a grand jury in January or July?
A. To my knowledge, that is correct.
Q. And for the last two or three weeks we haven't had either civil or grand jury action in January and July?
A. I don't know, but I don't think so.

Re-cross Examination

By: P. W. Jones

Q. Mr. Hand, you met with the grand jury at the April [fol. 55] term of court?
A. I did.
Q. How many negroes were on the grand jury?
A. One.

Q. Do you know how many were on the traverse jury?
A. I do not.

ReCross Examination

By: Clarence Mayfield

Q. Mr. Hand, since you have been solicitor of this judicial circuit have you had occasion or occasions to try cases before a petit jury?

A. I have tried two cases in Baker County, to the best of my memory, and I believe these were misdemeanor cases.

Q. It is your testimony, sir, that you do make presentments to the grand jury?

A. That is correct.

Q. And prior to the April term of this year will you state whether or not there was ever a member of the negro race among the grand jurors? Mitchell County.

A. I have had only one occasion to meet with the grand jury prior to this term and I don't remember one being there, and I don't think there was one there.

§ § § § § § § §

[fol. 56] Martha B. Hoggard, Sworn.

Direct Examination

By: P. W. Jones

Q. State your name, please.
A. Martha B. Hoggard.
Q. What position do you occupy?
A. Clerk of the Superior Court.
Q. Were you present when the grand and the petit jury for the April term of court was drawn?
A. Yes, I was.
Q. Did you make a list of those jurors?
A. Yes, I did.
Q. Did you pay those jurors off by check when the week was over?
A. I did.
Q. Do you know of your own knowledge how many of the grand jurors were negroes?
A. One.

Q. How many of the petit jurors were negroes?
A. One, I believe.
Q. When was the jury list drawn for the April term of court?
A. About two or three weeks before the term.
Q. About two or three weeks before the term of court?
A. Yes.
Q. Where was it drawn?
A. In this courtroom.
[fol. 57] Q. And you are sure it was two or three weeks before the term of court?
A. It was at least that.

Direct Examination

By: Clarence Mayfield

Q. Your name, please?
A. Martha B. Hoggard, H-o-g-g-a-r-d.
Q. Can you estimate, for the record, the number of petit jurors on the April panel?
A. Forty eight, I believe.
Q. Does that include both grand and petit jurors?
A. No. Let me correct that. I was speaking of the first week. There were 90 for the second term.
Q. Ninety for the second term, petit jurors. Can you estimate how many negroes were among this panel?
A. We had three.
Q. On the April panel?
A. On the petit jury.
Q. How many were on the grand jury?
A. Two. One did not appear. I beg your pardon, three and one did not appear, which left two.
Q. What was the number of whites on that same grand jury?
A. There were 30 drawn.

Cross Examination

By: Solicitor Hand

Q. How do you happen to know there were negroes on the grand jury and petit juries?
A. Well, I don't know that they were, but I assumed [fol. 58] they were.

Q. Were you informed that they were?
A. No, I just believe that I knew.

Redirect Examination

By: Clarence Mayfield

Q. How long have you been clerk of the Superior Court of Mitchell County?
A. Since September 14, 1960.
Q. Prior to the April term of court, do you have any personal knowledge of any negroes to serve on either the petit or the grand jury of Mitchell County?
A. I don't remember any.

Recross Examination

By: Solicitor Hand

Q. You are not saying there have not been any?
A. I'm not saying there have not been or have been.

§ § § § § § § §

W. H. Campbell, Sworn

Direct Examination

By: P. W. Jones

Q. What is your position, Mr. Campbell?
A. Tax Receiver.
Q. Do you maintain the tax records for Mitchell County, Georgia?
A. Yes sir.
[fol. 59] Q. Before the taxes are put in this tax digest, the taxpayer is required to come to your office and make a return, is he not?
A. Yes sir.
Q. How do the white taxpayers make their return? What color of paper do they use?
A. White.
Q. How do the colored taxpayers make their returns?
A. White.
Q. They are white?
A. Yes.

Q. Have they always been white?
A. They are this year.
Q. In other words, since the first of January they have been white?
A. Yes.
Q. You are not, therefore, keeping them according to the requirements of the State of Georgia?
A. Yes sir.
Q. Does the State or does it not require the tax returns to be kept on a segregated basis?
A. We got white—all white this year.
Q. Does the State require you to keep the returns on a segregated basis?
A. Yes.
Q. And you didn't do it this year?
A. Yes sir, we did.
[fol. 60] Q. How is your segregated basis?
A. We just mark the white sheets colored.
Q. The white sheets are marked colored?
A. Yes sir.
Q. How is it segregated in the tax digest?
A. Separate digests.
Q. And what is this digest?
A. That's last year's, 1964.
Q. In the 1965 digest do you have one for the colored and one for the whites?
A. Yes.
Q. So all of the colored taxpayers are kept in one digest and the white taxpayers are kept in another tax book?
A. It's in the same book.
Q. In the same book? Well, how do you distinguish between them?
A. We put a "c" on the colored when he comes in and returns his taxes.
Q. In other words, the colored taxpayer is marked with a colored "c"?
A. That's right.
Q. So, if I went thru your tax digest, I could determine from the returns exactly who are colored and who are white, could I not?
A. Yes sir, that's the State law.

[fol. 61] Cross Examination

By: Solicitor Hand

Q. Has the tax digest for the year 1965 been put together yet?

A. It has not.

Q. You don't know how it will be put together?

A. I don't know how we'll fix it.

Redirect Examination

By: P. W. Jones

Q. What tax digest did the tax commissioners use or did you turn over to them in preparing the jury list?

A. They used the whole books, all of them.

Q. All of the books you have? What do you mean by all of the books?

A. Actually I don't have anything to do with that. I guess they go thru the whole last year's books.

Q. They have to get them out of your office, don't they?

A. Yes.

Q. And they take those over to the Ordinary's office, where they held their meeting?

A. I don't know where they met.

Q. But you have to give them to them to take out of your office?

A. No sir, I don't remember giving them one.

Q. They come into your office and take them out?

A. I guess they come in there and look at them.

Q. What books would they have taken or how could they have gotten the list?

[fol. 62] A. Well, I would say in previous years before this year they could look at any of them.

Q. In previous years they would have had to have used them to get that tax list?

A. Yes.

Q. Now, in previous years how would you distinguish colored taxpayers from whites?

Solicitor Hand: Your Honor, I submit that what has happened in the past has nothing to do with this case.

P. W. Jones: Your Honor, he has testified that they took this list from the previous list.

The Court: I overrule the objection.

Q. How would you tell in the previous years? How would you distinguish between the colored taxpayers and the white taxpayers?

A. We had yellow sheets before.

Q. Before this year you had yellow sheets?

A. Yes.

Q. And the colored taxpayers were on yellow sheets?

A. That's right.

Q. And the white taxpayers were on the white sheets?

A. Yes.

Recross Examination

By: Solicitor Hand

Q. You don't know what procedure the jury commission used?

A. No, I don't have anything to do with it.

[fol. 63] Q. You don't know whether they used your books or not, do you?

A. No. I didn't know who they were until this morning.

Q. You don't know where they met, do you?

A. No.

Q. You don't know what method they used in selecting the prospective jurors, do you?

A. No.

Redirect Examination

By: P. W. Jones

Q. But, if they used your books, your books were kept as you have described?

A. You can come down there and look at them and see.

Q. I understand, but I say, if they used your books?

A. Yes.

Q. And they were last year's and the white taxpayers were on white returns and the colored taxpayers were on yellow sheets?

A. That's right.

Redirect Examination

By: Clarence Mayfield

Q. You are the official tax receiver of Mitchell County?
A. That's right.
Q. Does Mitchell County maintain more than one tax office?
A. Only one.
Q. And your books would be the official books, would they not?
A. That's right.
[fol. 64] Q. And those books would designate white as against negro taxpayers?
A. Yes.

§ § § § § § § §

Movants Rest

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W. H. Grogan, Recalled,
for
Cross Examination

By: Solicitor Hand

Q. State for the record your name.
A. Hayes Grogan.
Q. There has been some testimony to the effect that perhaps some of your tax digests have designations of race on the digest. Now, I ask you this: Did you or the jury commission or the other jury commissioners to your knowledge let the fact that the tax digest of Mitchell County had designations as to race or color influence your selection of any prospective grand jurors or petit jurors?
A. We did not.

Direct Examination

By: P. Walter Jones

Q. Mr. Grogan, you knew that the colored were marked colored, didn't you?
[fol. 65] A. No, I didn't know that. I don't know much about the tax digest.

Q. Did you examine the return of each taxpayer?
A. Some of them we did.
Q. Did you see whether some were on white sheets and some were on yellow?
A. Yes.
Q. You didn't know the yellow sheets were colored?
A. I didn't know that, no.
Q. But the sheets were yellow and white?
A. I think so.
Q. Did you know why they were yellow and white?
A. Identification, I guess.
Q. Identification for what purposes?
A. Any way the want to use them. I don't know why they keep the taxes separate.
Q. You said you thought they were that for identification. For what purpose of identification?
A. Well, I don't know. Just for identification is all I know.
Q. Were they to keep them separate from anything?
A. I don't know.
Q. Do you know why they used the two colors?
A. No, I don't.
Q. Nobody inquired as to why they used the two colors?
A. No, I didn't.
Q. No one discussed why they used the two colors? That question was never brought up?
[fol. 66] A. No, not that I remember.
Q. Were the white and yellow colors mixed together or were they separate?
A. They wasn't mixed.
Q. In other words, you had a set of yellow returns and a set of white returns, didn't you?
A. Probably did.
Q. And you didn't inquire as to why there were yellow returns and white returns?
A. We didn't know the difference.
Q. You don't know whether the rest of the commissioners knew or not?
A. No, I didn't ask them.
Q. That's all.

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O. C. Hammond, Recalled.

Cross Examination

by: Solicitor Hand

Q. State your name, please sir.

A. O. C. Hammond.

Q. Mr. Hammond, this morning there has been some testimony delivered on the stand to the effect that the tax digests of Mitchell County show some separation of race, with the colored designated by colored by some means, by a "c" or being on yellow sheets and the whites being on white sheets. Now, I ask you this question: [fol. 67] In the selection of prospective grand jurors and petit jurors, did you personally allow this dual system to effect your selection of any prospective juror?

A. No, I didn't.

Direct Examination

By: P. W. Jones

Q. What is your official position?

A. I'm City Clerk, tax collector, Pelham, Georgia.

Q. In Pelham, Georgia?

A. Yes.

Q. You make your own property tax return on your own personal property, do you not?

A. Yes.

Q. Your return is always made on a white sheet of paper, is it not?

A. Yes.

Q. When you were in the jury box you had a set of white tax returns and a set of yellow tax returns. Why did you think there was a difference in the two colors.

A. Well, it didn't occur to me anyway. I didn't know you made it from the tax returns. I thought you made it from the digest.

Q. One of your commissioners testified that they were made—

Solicitor Hand: Your Honor, I submit that he is leading this witness.

The Court: He will have to testify for himself.

[fol. 68] Q. What records did you use in making the jury list?

A. Well, we used the old list and, of course, we used the digest.

Q. You used the old list and the digest, and that was all that you did use?

Solicitor Hand: Your Honor, I submit counsel is leading the witness again.

Q. Was that all you used or not?

Solicitor Hand: Your Honor, I submit the question is incomplete.

P. W. Jones: Write it out, Mr. Hand, and I'll ask it like you write it.

Q. Did you or did you not use anything else?

A. I thought the law said use the tax digest. Why ask me the question?

Q. I'm just trying to find out what you used. What did you use? You said you used the tax digest and the old list. Did you use anything else?

A. I can't remember using anything else. I try to do what the law says to the best of my knowledge.

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[fol. 69] Harvey C. King, Recalled.

Cross Examination

By: Solicitor Hand

Q. State for the record your name.

A. Harvey C. King.

Q. This morning there was some testimony delivered in court here today that there is perhaps some designation as to race or color on the tax digests of Mitchell County, either by the designation of a "c" or a yellow sheet of paper for the colored taxpayers of the county and a white sheet of paper being used for white taxpayers. Now, if this is in fact true, did the fact that there was a designation of races on the tax digest, did that influence you or effect your selection of any prospective juror, grand juror or petit juror?

A. It did not.

Direct Examination

By: P. Walter Jones

Q. What was used? Was it a "c" or a yellow sheet?
A. I can't remember.
Q. You still don't recall anything about what happened?
A. Not about that, I don't.

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Solicitor Hand: I would like for the record to show that only three of the six jury commissioners summoned by the movants have been put on the stand by the movants.

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ALL CLOSE

[fol. 71] "Indictment filed April 12, 1965" is omitted from the record here. It appears printed at pages 5 and 6 supra.

[fol. 73]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 76]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

APRIL TERM, 1965

Number 1229

[File Endorsement Omitted]

STATE OF GEORGIA

vs.

PHIL WHITUS

ORDER AND JUDGMENT DENYING MOTION FOR A CHALLENGE TO THE ARRAY OF GRAND JURORS— April 19, 1965

WHEREAS, on April 16th the defendant's motion for a challenge to the array of grand jurors having been heard by me in open court, and after consideration of all evidence and testimony adduced at said hearing, it is hereby CONSIDERED, ORDERED and ADJUDGED that the prayers prayed for in said petition are hereby denied.

This 19th day of April, 1965.

/s/ Carl E. Crow
Judge, Superior Court
Mitchell County, Georgia

[fol. 77]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

[File Endorsement Omitted]

BILL OF EXCEPTIONS—filed May 17, 1965

TO THE SUPREME COURT OF THE STATE OF GEORGIA:

Be it remembered that in the case of the State of Georgia against Phil Whitus, based on an indictment returned by the Mitchell County Grand Jury in the January Term of 1960 your plaintiff in error was tried and convicted by a jury in the Mitchell County Superior Court in the January Term, 1960, and was sentenced to be electrocuted. Upon a writ of habeas corpus filed by your plaintiff in error the Fifth Circuit Court of Appeals reversed this conviction and afforded the State eight months from and after the denial of certiorari, said denial being made a judgment of the Federal District Court for the Southern District of Georgia on January 7, 1965, to reindict your plaintiff in error by a grand jury from which Negroes were not systematically excluded and to be retried before a jury from which Negroes had not been systematically excluded, or before some court or tribunal as not to violate the petitioner's constitutional rights.

On the 6th day of April, 1965, your plaintiff in error filed a Challenge to the Array of Grand Jurors for the reason that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, for more than twenty-five years. Since your petitioner is a member of the Negro race and is alleged to be a principal in the first degree in the murder of a member of the White race, such a challenge was material and pertinent. This challenge to the array was filed before the grand jury returned an indictment, said indictment being returned on the 12th day of April, 1965. [fol. 78] The Honorable Carl E. Crow, Judge of Superior Court of Mitchell County, Georgia, after hearing the evidence and the arguments of both parties, on the 19th

day of April, 1965, passed an order denying said motion, to which judgment denying said motion the plaintiff in this bill of exceptions then and there excepted, and now excepts and assigns the same as error and as contrary to law and contrary to the evidence, and says that the court erred in entering said judgment and in not entering a judgment in favor of the plaintiff in error sustaining his Challenge to the Array of Grand Jurors, upon the following grounds, to wit:

1. Plaintiff in error says that the court erred, as a matter of law, in refusing to allow your plaintiff in error to introduce into evidence the official census of the United States of America showing the population of Mitchell County, and further showing the number of Negroes in said county and the number of Whites in said county. This official census was tendered into evidence by your plaintiff in error and was objected to by the defendant in error, which objection the judge sustained.

2. Plaintiff in error further says that the court erred, as a matter of law, in refusing to grant said motion since the evidence adduced at said trial showed conclusively that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, same being in violation of the due process of law and equal protection of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the rights guaranteed to him by Article 3, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

[fol. 79] Plaintiff in error comes now on the 17th day of May, 1965, and within thirty days after the refusal to grant said motion and presents to his Honor, the Honorable Carl E. Crow, Judge, who presided in said case, his bill of exceptions, the same being signed and certified according to the statutes in such cases made and provided in order that the case may be carried to the Supreme Court of Georgia, that the errors herein set out and alleged may be considered and corrected by that court.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. The petition of your plaintiff in error Challenging the Array of Grand Jurors;

2. The indictment returned by the Mitchell County Grand Jury on the 12th day of April, 1965;

3. The Order and Judgment of the court refusing to grant the prayers in said petition, said Order being signed on the 19th day of April, 1965;

4. A stenographic report of the case, with immaterial questions and answers and parts thereof stricken;

5. Agreement and acknowledgment of service of counsel for defendant in error and entry of filing thereon;

6. The indictment returned by the Mitchell County Grand Jury, hereinbefore referred to, charging your plaintiff in error with a capital offense giving the Supreme Court of the State of Georgia exclusive jurisdiction over said case.

[fol. 80] WHEREFORE, plaintiff in error most respectfully prays that the same may be certified to and transmitted to the Supreme Court of the State of Georgia, in order that the alleged errors may be considered and corrected.

/s/ P. Walter Jones
Of Counsel for Plaintiff in Error

P. O. Box 1115
Albany, Georgia.

[fol. 81]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

APRIL TERM, 1965

Number 1229

PHIL WHITUS, PLAINTIFF IN ERROR

v.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

PAUPER'S AFFIDAVIT

Now comes PHIL WHITUS, plaintiff in error in the above stated case, and being dissatisfied with the order of the Judge overruling his Motion for Change of Venue, files this his appeal, and on oath says that he is advised and believes that he has good cause of appeal, and that, owing to his poverty he is unable to pay the costs required by law in cases of appeal.

/s/ Phil Whitus

Sworn to and subscribed before me this 17th day of May, 1965.

/s/ Eileen F. Jones
Notary Public

[fol. 82]

[ACKNOWLEDGMENT OF SERVICE
Omitted in printing]

[fol. 83]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions was tendered to me on the 17 day of May, 1965, and that the same is true, and specifies all the evidence, and specifies all the records material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Mitchell County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and verify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia as early as possible and not exceeding ten days from the filing in said office of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 17 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia

[fol. 84]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 87]

IN THE SUPREME COURT OF GEORGIA

Atlanta,

No. 23019

PHIL WHITUS

v.

THE STATE

MINUTE ENTRY OF ORDER TRANSFERRING CASE—
May 26, 1965

From the Superior Court of Mitchell County.

It is ordered that this case be hereby transferred to the Court of Appeals.

* * * *

[fol. 88]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

41420

WHITUS

v.

THE STATE

41421

DAVIS

v.

THE STATE

OPINION—September 8, 1965

NICHOLS, Presiding Judge. These cases were appealed to the Supreme Court and transferred by that

court to this court. Both defendants were indicted for murder but before such indictments were returned each defendant filed a challenge to the array of the Grand Jury based upon the deliberate exclusion and inclusion of negroes on the Grand Jury. After hearing evidence upon the issue thus made the trial court overruled the challenges to the array and it is on such judgment that the plaintiffs in error now assign error, as well as on a judgment during the trial wherein the trial court excluded documentary evidence described by counsel offering the same as "the 1960 Census of Population, Volume 1, characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein it shows a total population in the County of persons over 21 as being 10,206, of which 5,726 are white and 4,480 are colored." Held:

1. Both the trial court and this court will take judicial notice of the United States Census (See Tift v. Bush, 209 Ga. 769; 75 SE2d 805), and while the admission of evidence "to refresh the court's memory" would not be reversible error (See Fields v. Jackson, 102 Ga. App. 117, 128; 115 SE2d 877), the exclusion of evidence of a fact of which the court takes judicial notice in the hearing before the court without the intervention of a jury is not harmful error.

2. The remaining contentions of the plaintiffs in error [fol. 89] are controlled by the decision of the Supreme Court in the case of Brookins v. State, 221 Ga. 181 (143 SE2d), and under such decision show no reversible error.

Judgments affirmed. Eberhardt and Pannell, JJ., concur.

Decided September 8, 1965.

[fol. 90]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

No. 41420

PHIL WHITUS

v.

THE STATE

JUDGMENT—September 8, 1965

This case came before this court upon an appeal from the Superior court of Mitchell county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Nichols, P. J., Eberhardt and Pannell, JJ., concur.

BILL OF COST, $30.00

* * * *

[fol. 91]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

No. 41420

Decided—September 8, 1965.

PHIL WHITUS, PLAINTIFF IN ERROR

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—filed September 17, 1965

TO THE COURT OF APPEALS OF
THE STATE OF GEORGIA:

Comes now PHIL WHITUS, Plaintiff in Error, and within the time allowed by law, files this his motion for rehearing in the above stated case, and for grounds thereof says:

For the sake of brevity, Plaintiff in Error is hereafter referred to as Accused and Defendant in Error is hereafter referred to as the State.

I. THE COURT'S OPINION IN PARAGRAPH ONE OF ITS DECISION IS NOT SUSTAINED BY ANY OF THE CITED DECISIONS AND IS IN CONFLICT WITH THE LAWS OF THIS STATE.

The trial court excluded from its consideration the evidence cited by the Court of Appeals showing that "the 1960 Census of Population, Volume 1, characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein its shows a total population in the County of persons over 21 as being [fol. 92] 10,206, of which 5,726 are white and 4,480 are colored."

We must presume that the Honorable Carl Crow, presiding Judge of the lower court, acted in his usually fair

and honest method in his determination of the facts presented to him at the hearing. He was in error in not allowing the evidence concerning the Census to be introduced, and since he believed it could not be introduced, he must of a necessity have failed to take into consideration the facts shown by the Census and therefore the opinion that he made would of a necessity be erroneous. Many judges may be in error as to their impression of the law but we certainly cannot assume or believe that any jurist in the State of Georgia would be deliberately unfair. With this thought in mind we can certainly assume that the trial court judge believed in all sincerity that the Accused had only proven that only one negro had ever served on a Grand Jury in Mitchell County, Georgia, but had failed to prove anything with regards to the number of negro citizens in the County. If that be true, the Accused would have failed to make out a prima facie case and the judge would have been correct in his denial of the motion. The mere fact that the judge did not believe that the Census was admissible would unalterably lead to the conclusion that he did not consider it as evidence nor did he take judicial notice of its existence.

II. THE SECOND PARAGRAPH OF THE COURT'S OPINION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, THE COURT OF APPEALS OF THE STATE OF GEORGIA AND THE SUPREME COURT OF GEORGIA.

[fol. 93] This Honorable Court has admitted in its opinion that the Court should have taken judicial notice of the 1960 Census as it applied to Mitchell County, Georgia. This Census showed, in ages over 21, that 5,726 were white and 4,480 were colored. The Accused proved without question and without contradiction that only one negro had ever served on a Grand Jury in Mitchell County, Georgia. A long line of decisions of the Supreme Court of the United States have systematically and without exception held that these two facts made out a prima facie case of the systematic exclusion of negroes from a grand jury and there was cast upon the State the burden

of proving that the grand jurors had been constitutionally drawn.

A review of the evidence offered by the State shows, with remarkable clarity, the vagueness and lack of memory of all of their jury commissioners and was quite remarkable in the fact that none of the commissioners could remember how, or in what manner, or from what records, or in whose office, or at what time, the names of the grand jurors were selected.

The State cannot hope to overcome the vagueness of the commissioners by their parrot-like yes's to the one question, "Were negroes systematically excluded from the Grand Jury?" Though their affirmatives ran out like a clarion bell to this question, their memories in other respects were clogged with cobwebs of doubt.

In addition to the mystic maze left by the evidence of the jury commissioners, this Court may also take judicial notice of the decision by the Fifth Circuit Court of Ap- [fol. 94] peals (Whitus v. Balkcom, 333 F2d 496) wherein the State admitted that negroes had been systematically excluded from all juries in Mitchell County, Georgia, through January of 1960. This may be taken into consideration with the uncontradicted fact that there was no revision of the jury list until just prior to the April 1965 Term of the Superior Court.

This Honorable Court cited Brookins v. State, (22979), Ga. (SE2d), which counsel does not have since it has not yet been published, however this Court is in conflict with itself and in 110 Ga. App. 56, on page 66, this very Court held:

> "Whenever Negroes have been systematically excluded from jury service in Georgia it has been in defiance of, rather than in compliance with, Georgia law. Never in its history has Georgia by law systematically excluded Negro citizens as a class from jury service. On the contrary, it has always been the law that they are not so excluded. As the Supreme Court of Georgia stated in Wilson v. State, 69 Ga. 224, 237, supra, "In the law . . . as in the Constitution (provisions respecting selection of jurors), it will be seen that no distinction resting on race or

color is made; and . . . it is made a felony (Code Section 26-4010), punishable by penitentiary imprisonment, for any commissioner to violate the law in this regard." The general law must be followed throughout the State. Tompkins v. State, 138 Ga.
[fol. 95] 465, 468, supra. An accused, irrespective of his race, cannot be indicted before a grand jury or tried before a traverse jury not legally impaneled. Finnegan v. State, 57 Ga. 427, supra; Wilson v. State, 69 Ga. 224, 236, supra; Tompkins v. State, 138 Ga. 465, 469, supra.

When an irregularity in criminal proceedings involving the constitutional rights of a defendant is shown, it is per se injurious to the defendant. Zugar v. State, 194 Ga. 285, 291 (21 SE2d 647); Montos v. State, 212 Ga. 764, 766 (95 SE2d 792); Bobo v. State, 103 Ga. App. 685, 686 (120 SE2d 203); Thiel v. Southern Pacific Co., 328 U.S. 217, 220, Supra; Fay v. New York, 332 U.S. 261, 300, supra (dissenting opinion); United States v. Roemig, 52 FSupp. 857, 862, supra; People v. Medeoff, 344 Mich. 108 (73 NW2d 537); Zimmerman v. State, 191 Md. 240 (59 A2d 675).

The unlawful selection of juries is, of course, more than an irregularity. Rudd v. State, 231 Ind. 105 (107 NE2d 178). "Grand jurors who have not been lawfully impaneled or sworn have no more authority to find indictments than the same number of citizens outside of the courthouse—they are not a grand jury in law." Tompkins v. State, 138 Ga. 465, 467, supra;
[fol. 96] accord Glass v. State, 109 Ga. App. 353, 354, supra; Ludden v. State, 109 Ga. App. 745, supra.

"Whenever the State undertakes to deprive one of its citizens of his life or liberty, it is the duty of the courts to see that it is done in accordance with the laws of the land, and not otherwise." Finnegan v. State, 57 Ga. 427, 430, supra. If there is anything sacrosanct, it is that there cannot be a legal right to break the law under the law. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with im-

punity. All of the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government." United States v. Lee, 106 U.S. 196, 220 (1 SC 240, 27 LE 171). All of us, the public officer and the civil rights demonstrator, must accept the rule of law and abide by it in all areas of our lives, or no one will abide by it and we cannot be protected in our rights in any area. See Hurtado v. California, 110 U.S. 516, 536, supra. The law is the law—is the law—is the law."

CONCLUSION

We respectfully submit that the Court has overlooked [fol. 97] vital parts of the evidence in this case and the authorities applicable thereto, and has misconstrued the Court's rejection of the facts and figures of the 1960 Census.

WHEREFORE, plaintiff prays that this his motion for rehearing be granted, and that the decision of the Court be reversed.

Respectfully submitted,

CHARLES MORGAN, JR.,
and P. WALTER JONES

By /s/ P. Walter Jones
Attorneys for Plaintiff in Error

P. O. Address:

P. O. Box 1115,
Albany, Georgia 31702

GEORGIA, DOUGHERTY COUNTY.

I, P. WALTER JONES, of counsel for the Accused, do certify that upon careful examination of the opinion of this Court and the authorities cited therein, and upon careful examination of the record and the decisions cited herein do verily believe that these have been overlooked

by this Court and that such facts and decisions would require a different judgment from that rendered, and believe that the Court has erroneously construed the statutes and decisions cited in its opinion.

This 16th day of September, 1965.

/s/ P. Walter Jones

[fol. 98]

[Certificate of service Omitted in printing]

[fol. 100]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

No. 41420

PHIL WHITUS

v.

THE STATE

ORDER DENYING MOTION FOR REHEARING—
September 22, 1965

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

* * * *

[fol. 101]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA.

Case Number 41420

[File Endorsement Omitted]

PHIL WHITUS

vs.

STATE OF GEORGIA

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR WRIT OF CERTIORARI— filed October 1, 1965

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that it is the intention of PHIL WHITUS, Plaintiff in Error, to apply to the Supreme Court of Georgia, for the writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the case above stated on September 8, 1965, in which case a motion for re-hearing was denied on September 22, 1965. A certified copy of the entire record is hereby ordered.

This 30th day of September, 1965.

/s/ P. Walter Jones
Attorney of Record for Plaintiff in Error.

P. O. Box 1115,
Albany, Georgia.

[fol. 102]

[Certificate of Service Omitted in printing]

[fol. 103]

IN THE SUPREME COURT OF GEORGIA
ATLANTA,

No. 23239

PHIL WHITUS

v.

THE STATE

ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI—
November 9, 1965

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur except Mobley, J., not participating for providential cause.

BILL OF COSTS, $15.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA
Nov. 24, 1965

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that American Civil Liberties Union paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb, Clerk.

Case No. 41420

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Nov. 24, 1965

/s/ Morgan Thomas
Clerk Court of Appeal of Georgia.

[fol. 104]

[Clerk's Certificate to foregoing transcript omitted in printing]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

INDICTMENT—filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell

to-wit:

1 C. B. Collins Foreman.

2	D. B. Harrell	13	H. C. King
3	James Lee Adams	14	John C. Kemper
4	John S. Gee	15	Lee Arn. Collins
5	[illegible]	16	Drewry O. Hayes
6	E. T. Hinchliffe	17	Cleo A. Scruggs
7	[illegible]	18	Walter L. Rideon
8	Drewry Robinson Sr.	19	Hayward Snipes
9	J. C. Bullard Jr.	20	Theo Thompson
10	Ray Nazworth	21	L. T. Hatcher
11	[illegible]	22	Louis M. Hatley
12	J. C. McCollum	23	

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th day of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

[fol. 106]

WITNESSES FOR THE STATE

Douglas Townsend
Mrs. Peter Glenn
John M. Maples
Lynnwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

* * * *

No. 1229

SUPERIOR COURT

Mitchell County

April Term, 1965

THE STATE

vs.

LEON (LYNN) DAVIS
PHIL WHITUS

Murder

TRUE BILL

/s/ Brantley Collins
Foreman.

FRED HAND, JR., Solicitor General
JOHN M. MAPLES
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Baliff, and FILED IN OFFICE APR 12, 1965

/s/ Martha B. Hoggard
Clerk Superior Court

* * * *

[fol. 107] "Petitioner's Challenge to the Array of Grand Jurors, Order to Show Cause, Transcript of Hearing and Order and Judgment denying motion for a challenge to the Array of Grand Jurors" in case of *State* v. *Leon Davis* are omitted in printing as they appear in identical form in case of *State* v. *Phil Whitus*, pages 1-50 supra.

[fol. 108]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

[File Endorsement Omitted]

BILL OF EXCEPTIONS—filed May 18, 1965

TO THE SUPREME COURT OF THE STATE OF GEORGIA:

Be it remembered that in the case of the State of Georgia against Leon Davis, based on an indictment returned by the Mitchell County Grand Jury in the January Term of 1960 your plaintiff in error was tried and convicted by a jury in the Mitchell County Superior Court in the January Term, 1960, and was sentenced to be electrocuted. Upon a writ of habeas corpus filed by your plaintiff in error the Fifth Circuit Court of Appeals reversed this conviction and afforded the State eight months from and after the denial of certiorari, said denial being made a judgment of the Federal District Court for the Southern District of Georgia on January 7, 1965, to reindict your plaintiff in error by a grand jury from which Negroes were not systematically excluded and to be retried before a jury from which Negroes had not been systematically excluded, or before some court or tribunal as not to violate the petitioner's constitutional rights.

On the 10th day of April, 1965, your plaintiff in error filed a Challenge to the Array of Grand Jurors for the reason that members of the Negro race had been systematically excluded from grand juries in Mitchell Coun-

ty, Georgia, for more than twenty-five years. Since your petitioner is a member of the Negro race and is alleged to be guilty of the murder of a member of the white race, such a challenge was material and pertinent. This challenge to the array was filed before the grand jury returned an indictment, said indictment being returned on the 12th day of April, 1965.

[fol. 109] The Honorable Carl E. Crow, Judge of Superior Court of Mitchell County, Georgia, after hearing the evidence and the arguments of both parties, on the 19th day of April, 1965, passed an order denying said motion, to which judgment denying said motion the plaintiff in this bill of exceptions then and there excepted, and now excepts and assigns the same as error and as contrary to law and contrary to the evidence, and says that the court erred in entering said judgment and in not entering a judgment in favor of the plaintiff in error sustaining his Challenge to the Array of Grand Jurors, upon the following grounds, to wit:

1. Plaintiff in error says that the court erred, as a matter of law, in refusing to allow your plaintiff in error to introduce into evidence the official census of the United States of America showing the population of Mitchell County, and further showing the number of Negroes in said county and the number of whites in said county. This official census was tendered into evidence by your plaintiff in error and was objected to by the defendant in error, which objection the judge sustained.

2. Plaintiff in error further says that the court erred, as a matter of law, in refusing to grant said motion since the evidence adduced at said trial showed conclusively that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, same being in violation of the due process of law and equal protection of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the rights guaranteed to him by Article 3, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

[fol. 110] Plaintiff in error comes now on the 18th day of May, 1965, and within thirty days after the refusal to

grant said motion and presents to his Honor, the Honorable Carl E. Crow, Judge, who presided in said case, this his bill of exceptions, the same being signed and certified according to the statutes in such cases made and provided in order that the case may be carried to the Supreme Court of Georgia, that the errors herein set out and alleged may be considered and corrected by that court.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. The petition of your plaintiff in error Challenging the Array of Grand Jurors;
2. The indictment returned by the Mitchell County Grand Jury on the 12th day of April, 1965;
3. The Order and Judgment of the court refusing to grant the prayers in said petition, said Order being signed on the 19th day of April, 1965;
4. A stenographic report of the case, with immaterial questions and answers and parts thereof stricken;
5. Agreement and acknowledgment of service of counsel for defendant in error and entry of filing thereon;
6. The indictment returned by the Mitchell County Grand Jury, hereinbefore referred to, charging your plaintiff in error with a capital offense giving the Supreme Court of the State of Georgia exclusive jurisdiction over said case.

[fol. 111] WHEREFORE, plaintiff in error most respectfully prays that the same may be certified to and transmitted to the Supreme Court of the State of Georgia, in order that the alleged errors may be considered and corrected.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

Savannah, Ga.

[fol. 112]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

APRIL TERM, 1965

Number 1229

LEON DAVIS, PLAINTIFF IN ERROR

v.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

PAUPER'S AFFIDAVIT

Now comes Leon Davis, plaintiff in error in the above stated case, and being dissatisfied with the order of the Judge overruling his Motion for Change of Venue, files this his appeal, and on oath says that he is advised and believes that he has good cause of appeal, and that, owing to his poverty he is unable to pay the costs required by law in cases of appeal.

/s/ X (his mark)
LEON DAVIS

Sworn and subscribed to before me this 18th day of May, 1965.

/s/ Martha B. Hoggard
Notary Public

[fol. 113]

[ACKNOWLEDGMENT OF SERVICE
Omitted in printing]

[fol. 114]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

GEORGIA, MITCHELL COUNTY

I do certify that the foregoing bill of exceptions was tendered to me on the 18 day of May, 1965, and that the same is true, and specifies all the evidence, and specifies all the records material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Mitchell County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and verify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia as early as possible and not exceeding ten days from the filing in said office of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 18 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia

[fol. 115] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 116]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Case No. 1229

[File Endorsement Omitted]

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

Challenge to the Array (Grand & Petit)

NOTICE OF PRESENTATION OF BRIEF OF EVIDENCE FOR APPROVAL—filed May 19, 1965

TO THE HONORABLE FRED B. HAND, JR., Attorney of Record for THE STATE OF GEORGIA:

You are hereby notified that I shall present to the Honorable Carl Crow, Judge of the Superior Court of Mitchell County, Georgia, at 2 o'clock P.M., on the 19 day of May, 1965, a Brief of Evidence in the above stated case for approval in his office in the Court House in Mitchell County, Georgia.

This Notice is given you pursuant to the provisions of Section 6-802 of the Code of Georgia. This 19 day of May, 1965.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 117]

[ACKNOWLEDGEMENT OF SERVICE Omitted in printing]

ORDER APPROVING—May 19, 1965

The foregoing 61 pages of typewritten material are hereby approved as containing a correct brief of the evidence in said case, and the same are hereby ordered filed as part of the record in said case.

This 19 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court of
Mitchell County, Georgia

[fol. 119]

IN THE SUPREME COURT OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 23020

MINUTE ENTRY OF ORDER TRANSFERRING CASE—
May 26, 1965

From the Superior Court of Mitchell County.

It is ordered that this case be hereby transferred to the Court of Appeals.

* * * *

[fol. 120] "Opinion of Presiding Judge Nichols, decided September 8, 1965" is omitted from the record here as it appears on pages 56-57 supra.

[fol. 122]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 41421

JUDGMENT—September 8, 1965

This case came before this court upon an appeal from the Superior court of Mitchell county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Nichols, P. J., Eberhardt and Pannell, JJ., concur.

Bill of Cost, $30.00

* * * *

[fol. 123]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. 41421

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—filed September 17, 1965

The decision in the above case was rendered on September 8, 1965, and within Ten (10) days thereafter Plaintiff in Error moves the Court for a rehearing on the grounds that:

1. That evidence in said case was sufficient to show the systematic exclusion of Negroes from service upon the grand jury which indicted the plaintiff in error, and movant asks the court to reexamine the evidence in said case.

2. There was insufficient emphasis placed on the complete testimony Mr. W. H. Campbell, who testified under cross-examination "All of the colored taxpayers are kept in one digest and the white taxpayers are kept in another tax book."

3. We urge the Court to reconsider its ruling in light Avery V. Georgia, 345 U.S. 559, cited by Brief of Plaintiff in Error, which sets forth the principle that when in considering the facts evidence and all reasonable deductions therefrom that "Opportunity for working of a discriminatory system exist whenever the mechanics for jury selection has a component part, such as the slips here, that differentiate between white and colored.

Movant therefore asks that the Court reexamine the record in said case, and that the previous order be reversed and set aside.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[fol. 124] CERTIFICATE OF ATTORNEY

I hereby certify that I am attorney of record for the Plaintiff in Error, movant in the above and foregoing Motion for Rehearing; and

I further certify that said Motion for Rehearing is not being filed for the purposes of delay, I believe that in view of added emphasis being placed on Avery v. Georgia, 345, U.S. 559, the court should reach a different conclusion as a matter of law. I believe there is merit therein and that upon reexamination of the record by the court, that the decision heretogore rendered would be reversed and set aside.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 126]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 41421

ORDER DENYING MOTION FOR REHEARING—
September 22, 1965

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

* * * *

[fol. 127]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. 41421

Writ of Error

From the Superior Court of Mitchell County

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR WRIT OF CERTIORARI—
filed September 28, 1965

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that it is the intention of LEON DAVIS, Plaintiff in Error, to apply to the Supreme Court of Georgia for the writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the above stated case on September 8, 1965, in which case a motion for rehearing was denied on September 21, 1965. A complete copy of the record is hereby ordered.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error
Leon Davis

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 129]

IN THE SUPREME COURT OF GEORGIA
ATLANTA

No. 23240

LEON DAVIS *v.* THE STATE

ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI—
November 9, 1965

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur except Mobley, J., not participating for providential cause.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

Nov. 30, 1965

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that American Civil Liberties Union paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb
Clerk

Case No. 41421

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Nov. 30, 1965.

/s/ (Illegible)
Deputy Clerk
Court of Appeals of Georgia

[fol. 130] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 131]

SUPREME COURT OF THE UNITED STATES

No. 1270 Misc., October Term, 1965

PHIL WHITUS AND LEON DAVIS, PETITIONERS

v.

GEORGIA

On petition for writ of Certiorari to the Court of Appeals of the State of Georgia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 20, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1435, placed on the summary calendar and set for oral argument immediately following No. 918 Misc.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 226498 83